Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

To: The Commission

REPLY COMMENTS OF
TRIBUNE BROADCASTING COMPANY

Tribune Broadcasting Company[1] submits these Reply Comments in response to the *Notice of Proposed Rulemaking* in this Docket, released March 3, 2011 (*"Notice"*), and comments filed in response to the *Notice*.

Tribune endorses the comments filed by the National Association of Broadcasters[2], and submits these comments to underscore the importance of retaining the Commission's network nonduplication and syndicated exclusivity rules[3], which are essential to the health of local television stations and their ability to serve the public.

The Commission's program exclusivity rules are well established, long predating the 1992 Cable Act that permitted television stations to consent to retransmission of their signals. They have an independent justification that is interwoven with copyright and communications

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1. Tribune, through subsidiaries, owns 23 network-affiliated television stations, a regional cable news network, a national superstation and a national multicast network, Antenna TV. Only one of Tribune's stations is a primary-channel affiliate of a network that programs a majority of the broadcast day. Accordingly, Tribune stations acquire, and their financial health depends on, substantial amounts of syndicated programming, in addition to local news and live sports programs in some markets.

2. Filed May 27, 2011.

3. Sometimes referred to below as the "program exclusivity rules."

policy. And until very recently, they were seldom the target of criticism, let alone hostility. Broadcasters, cable and satellite providers apply them as a matter of routine every day. Only when they came to be viewed as a tactical device in retransmission consent disputes — which is not why they exist or how they are used — have the rules been singled out for such vitriol from multichannel video program distributors ("MVPDs").

These comments will briefly explain how the program exclusivity rules are used in their daily context, what protections and restrictions accompany them, why they are more important than ever to retain, and why MVPD calls to extinguish the rules or revoke them during retransmission consent disputes are misplaced. Tribune also will comment on MVPD proposals to ban broadcasters' efforts to include non-cash compensation, including carriage of multicast channels, in their retransmission consent proposals.

I. THE PROGRAM EXCLUSIVITY RULES SHOULD BE RETAINED.

When stations acquire rights to exhibit programming on a network or syndicated basis, one of the key terms of the agreement is the territorial scope of the licensed rights, and whether those rights are exclusive or non-exclusive.[4] Unlike other countries that rely on national broadcasting services, the tradition in this country is for market-by-market licensing of programming rights, with one exhibitor to a market. The local broadcaster acquires programming that will best serve its audience's tastes and needs. This is the principle of localism. Broadcasters obtain exclusive rights to maximize the return on their programming investments, and to derive the full benefit of their promotional expenses, all in the interests of improving program quality

4. The exclusivity model is common in programming licensed by the MVPD industry, as well. Sports, movies, original series and reruns of off-network programs are typically licensed to only one network at a time, for the same reasons that underlie local broadcast exclusivity.

and diversity. But that exclusivity is imperfect. It is subject to the peculiarities of copyright law, which may permit importation of distant signals[5], and to the Commission's rules, which limit the territory in which a station's rights can be exclusive.[6]

As the *Notice* observes, the Commission's exclusivity rules provide a mechanism for a station to enforce its contractual grants of exclusivity, rather than being a substantive source of rights.[7] A program supplier may choose to grant nonexclusive rights, or to limit exclusive rights in any number of ways — territorially (to specified areas), temporally (to a certain period of a license term, or to certain times of day), or otherwise (to simultaneous duplication only, or to certain distant signals but not others). Tribune stations have negotiated exclusivity of all of these types.[8]

The FCC program exclusivity rules permit a broadcaster to enforce only such rights as it has obtained in a private transaction, subject to notice requirements[9] and certain limitations

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5. 17 U.S.C. §§ 111, 119. These are compulsory licenses, which permit an MVPD to carry a distant signal under stated conditions, whether or not a local station and its program supplier objects. One of those conditions is that the MVPD's carriage of the signal be "permissible under the rules, regulations or authorizations of the Federal Communications Commission." 17 U.S.C. §§ 111(c)(1), 119(a)(1). Thus, these statutory licenses incorporate by reference the program exclusivity rules.

6. 47 C.F.R. § 73.658(m).

7. *Id.*, ¶ 42.

8. The program supplier, in the first instance, decides whether to offer program exclusivity and what form it will take. Many of Tribune's stations were affiliates of The WB Television Network, which in its early years of operation chose not to grant nonduplication protection to affiliates, as a means of maximizing network viewing. As its affiliate base grew and affiliates lost audience to imported signals, the network in 1999 reversed course and granted nonduplication protection to affiliates.

9. See 47 C.F.R. §§ 76.94, 76.105 (cable); 76.122(c), 76.123(d) (satellite).

designed to satisfy policy goals[10]. The rules are a model of administrative efficiency — the Commission expends virtually no resources in enforcing them. Broadcasters negotiate their agreements, give notice of the exclusivity terms to MVPDs, and cable and satellite providers honor them. They implement important communications policies developed by the Commission over decades, balancing rights of broadcasters, MVPDs, program suppliers and viewers. They could not be replaced by any other available mechanism, including the blunt instrument of copyright infringement litigation.

These rights are critically important to broadcasters, who rely primarily on advertising revenue. An imported distant signal diverts audience from a local broadcaster holding exclusive rights.[11] Program duplication reduces the audience the local station can achieve, reduces its incentive to promote its programming, and lessens the advertising revenue it will derive. This, in turn, injures the broadcaster's ability to compete for programming, and to produce local news and public affairs programming to serve its local audience. Moreover, the lost audience revenues due to program duplication are truly lost — local advertisers in the distant signal's home market will not be willing to pay extra to reach distant viewers with whom they have little or no prospect of doing business.[12]

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10. See 47 C.F.R. §§ 76.95(a), 76.106(b) (exemption for small cable systems); 76.92(f), 76.106(a) (exemption for significantly viewed signals); 76.92 Note, 76.101 Note (geographic zone of protection); 76.103(b) (distributor's pre-release syndicated exclusivity rights). Section 76.103(b) requires blackouts for up to one year when no local station is carrying the affected program.

11. The Commission found that program duplication caused diversion of viewers when it reinstated the syndicated exclusivity rules in 1988. See *United Video, Inc. v. FCC*, 890 F.2d 1173, 1178-79 (D.C. Cir. 1989).

12. For this reason, Tribune stations in adjoining markets (San Diego/Los Angeles, Philadelphia/ New York, Hartford/New York) typically invoke syndicated exclusivity and network nonduplication rights against one another, to derive, to the maximum extent possible, the greatest economic return from local viewing of their network and syndicated programming .

Thus, as a matter of economics, which directly affects the quality of the programming a station is able to offer, the broadcaster's ability readily to enforce program exclusivity it has negotiated for is of paramount importance.[13] This is especially the case where program suppliers have diluted the broadcaster's exclusive rights in any number of ways it cannot control — by selling DVDs or downloads of popular programs and motion pictures, by making entertainment and live sports programs available to mobile devices and online, in some cases at no charge to the audience but with associated advertising, and by licensing programs for distribution over cable networks at the same time they are distributed through broadcast stations.

To read the comments filed by MVPDs in response to the *Notice*, one would think the program exclusivity rules were adopted a year or two ago as part of a devious strategy by broadcasters to extract cash compensation from cable operators and satellite providers. Of course, the current rules have been in place for more than 20 years, and are the carefully crafted product of federal policies governing communications and intellectual property.[14] They balance the rights of each stakeholder in the process — the cable operator, the DBS service, the network, the program supplier, the broadcaster, the viewer — and give unfair advantage to none of them.

As decades of successful application have shown, the rules serve the public interest by protecting a broadcaster's program investments. They also help sustain the flow of quality programming to the public by protecting a program *producer's* investments. If regulatory failures prevent producers from obtaining a fair return on distribution of their programs through local broadcast stations, they simply will turn to national services available only to paying subscribers. This will directly impair broadcasters' ability to acquire and produce the best and most diverse

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13. See NAB Comments at 56-59, Comments of LIN Television Corp. at 22 (filed May 27, 2011).

14. See Comments of The Walt Disney Co. at 18 (filed May 27, 2011).

array of local, syndicated, sports and network programs.

Repealing the rules, as advocated universally by MVPDs, would benefit no one. It would permit unlimited duplication of programs already available on local signals, siphoning off audience and reducing advertising revenue [15] — all at a time when the economy is in difficult straits and reports of broadcaster layoffs are more common than those of business expansion.

The *Notice* raises the possibility of stripping a station's program exclusivity rights if retransmission consent negotiations reached impasse and an MVPD ceased carrying, or having the right to carry, a station's signal.[16] MVPDs advocate this proposal as a means of enhancing their relative bargaining power in negotiations.

Tribune believes that voiding a station's program exclusivity rights during retransmission disputes would be bad policy.[17] It would deprive the broadcaster of a regulatory mechanism designed to protect its investments in programming in an effort to deter it from obtaining the full value of its statutory retransmission consent rights. It is not the Commission's place to play favorites or alter the stakes in these negotiations where no substantial public harm has resulted. As noted by NAB, the number of service disruptions has been infinitesimal.[18] Moreover, in addition to having the opportunity to switch providers, consumers in most cases can receive a station's signal free over-the-air. And if they live far from the center of a market but in an area

15. This is the philosophy underlying the restriction in § 119(a)(2) of the Copyright Act, which limits importation of distant network signals to "unserved households."

16. *Id.*, ¶44.

17. The DBS providers' proposal to grant subscribers an involuntary "waiver" permitting receipt of distant network signals, designed to accomplish the same result, *see* Comments of DISH Network L.L.C. at 28 (filed May 27, 2011), Comments of DIRECTV, Inc. at 11 (filed May 27, 2011), is equally unwise, and would exceed the Commission's authority.

18. NAB Comments at 7-8. Tribune has negotiated many hundreds of retransmission agreements, and has never reached an impasse that resulted in a service disruption at any of its stations.

where a distant station is "significantly viewed," the program exclusivity rules will permit continued MVPD access to network and syndicated programs available on the station engaged in the carriage dispute.[19]

Tribune agrees with the many broadcaster comments[20] that the parties to retransmission consent negotiations take them seriously and make good-faith efforts to conclude them without risking the good will of their audiences and community leaders that is sure to be jeopardized by a service disruption. The broadcaster immediately loses good will, audience and advertising revenue when its signal ceases to be carried by a local MVPD. The Commission is entitled to rely on these market forces, which have been borne out in the real world for nearly 20 years. It should forbear from tinkering with its exclusivity rules to redress a perceived problem that does not exist. In addition, Commission action could be expected to significantly alter the dynamics of retransmission negotiations in ways the Commission cannot accurately foresee.

II. THERE IS NO NEED TO REGULATE IN-KIND CONSIDERATION AS PART OF THE GOOD-FAITH NEGOTIATION RULES.

In the past two decades, Tribune has negotiated terms for carriage of programming networks including multicast channels, video on demand content, news services and promotional material, for selling advertising time on the station and for buying advertising time on cable systems. In each case the consideration was tailored to the parties' desires and capabilities.

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19. MVPD comments fail to note that a cable operator or satellite provider would have to negotiate an interim retransmission agreement with a distant station before it could import the station into a distant market. Apart from restrictions that may be contained in the distant station's network or syndicated programming agreements, the distant station may prefer not to have its signal used as a weapon in a battle between another broadcaster and an MVPD, partly because it will not want to have that weapon used against it in a future retransmission consent negotiation.

20. See, *e.g.*, Comments of Allbritton Communications Co. at 4 (filed May 27, 2011), Comments of Local TV, LLC at 3-4 (filed May 27, 2011).

Tribune was a major participant in the launch of the Food Network in 1993, through retransmission consent negotiations. Tribune has negotiated for carriage of multicast networks providing music, sports, entertainment programs, weather, and Spanish-language programming. All have been carried by at least some of the MVPDs in Tribune's local markets, as a result of the retransmission consent process. This benefit of the digital transition — and Tribune's investment of millions of dollars in new digital facilities to implement it — would be lost if a proposal in several MVPD comments, to require broadcasters to propose a cash-only offer for retransmission consent, at the MVPD's request, were adopted.[21]

Tribune agrees with NAB that there is no need for the Commission to adopt this sort of *per se* rule in furtherance of the existing good-faith negotiation requirement, and that such a rule would violate congressional intent.[22] The program networks that have sprung up as a result of retransmission consent negotiations have enriched the diversity of programming available to the public, without disrupting the negotiation process. Clearly if an offer of multiple program networks constituted illegal tying under the Sherman Act, the antitrust laws provide an adequate remedy for aggrieved MVPDs. But there have been no abuses raised in the comments, and most MVPDs are very selective about what sorts of additional program channels they will agree to carry. There is no evidence of coercion here, and no need for Commission action.

CONCLUSION

The Commission's program exclusivity rules are working. They accomplish the

21. See, *e.g.*, DIRECTV Comments at 25-26, Comments of the American Public Power Assn. *et al.*, at 25-26 (filed May 27, 2011), Comments of Cablevision Systems Corp. at 11 (filed May 26, 2011). It is ironic to see such opposition to broadcasters' "bundling of services." It is a long-used business model for programming and other services MVPDs provide to their customers.

22. NAB Comments at 51-55.

Commission's policy goals and balance the rights of stations, MVPDs, networks, syndicators and viewers. They are vital to the economic health of broadcasters and the flow of programming to broadcast television viewers. The protections the rules supply could not be replicated by private contracts.

Repealing these rules, or suspending their effect in cases of broadcaster-MVPD carriage disputes, would serve none of the Commission's goals while changing the dynamics of negotiations to broadcasters' detriment in ways the Commission cannot accurately foresee. Similarly, there is no need for a federal rule requiring a broadcaster electing retransmission consent to make a "cash-only" offer to an MVPD on request. MVPDs are sophisticated negotiators who provide the point of entry to most viewers' homes. Local broadcasters need to reach agreements with them, and they are capable of looking out for their own interests.

Given the overwhelmingly successful track record of negotiations between MVPDs and broadcasters, there is no justification for placing the Commission's thumb on the scales of retransmission negotiations. The good-faith requirements of the Commission's rules are being met on a daily basis, and there is no need for new rules in the areas discussed in these comments.

Respectfully submitted,

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